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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-648

RAMON D'EUGENIO,

Petitioner,

-against-

SLATTERY CONSTRUCTION CO., INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

No.

RAMON D'EUGENIO,

Petitioner,

-against-

SLATTERY CONSTRUCTION CO., INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New York dated July 7th 1971. Time to file this petition has been extended to November 12, 1971 by Order of this Court dated October, 12, 1971.

OPINION BELOW

The only opinion written was by the Supreme Court of the State of New York, County of Richmond. This memorandum opinion is unreported but appears in full in the appendix of this petition.

JURISDICTION

The Court of Appeals for the State of New York denied appellant's motion for leave to appeal on the 7th day of July,

1971. A copy of the Court's order is annexed as part of the appendix.

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257 (3).

QUESTION PRESENTED

Did the Trial Court fail to consider and properly interpret Section 241 of the Labor Law, as amended in 1962, as the controlling law?

Where a State statute is enacted for the express purpose of providing protection to persons, lawfully at or about an excavation which is inherently dangerous, may the Trial Court summarily discriminate between employees of sub-contractors, employees of the general contractor, and members of the public where the statute specifically provides protection for all persons without distinction in personal injury claims against the general contractor?

REASON FOR GRANTING THE WRIT

The manner of the interpretation of Section 241 of the Labor Law is repugnant to the Constitution, Treaties and Laws of the United States and it violates uniformity of decision as applicable to citizens of the United States injured under identical circumstances.

STATEMENT

Petitioner was an employee of the Post Construction Company (hereinafter referred to as Post) a subcontractor of the respondent, general contractor, Slattery Construction Co. Inc., (hereinafter referred to as Slattery).

Petitioner was engaged in digging deep trenches for the purpose of laying sewer lines in the various approaches to the Verrazano Bridge in Staten Island, at the area known as Clove Lake Expressway, west of Manor Road, Staten Island. This operation had been going on approximately two years prior to the accident and the trenches had been dug with the same disregard to the safety of the workmen as existed at the place and the time of this accident, namely, on the 27th day of September, 1963, in an inherently dangerous manner in violation of Section 241 of the Labor Law of the State of New York as amended and effective October 1, 1962.

Proof of inherent danger was based on the fact that the trench in question was such that there was an ever present risk of it caving in as a consequence of the depth, width and length of the trench, and the absence of proper shoring or other means to protect the sides from caving in.

POINT I

THE COURT BELOW WAS REQUIRED TO RECOGNIZE SECTION 241 OF THE LABOR LAW, AS AMENDED, EFFECTIVE OCTOBER 1, 1962, AS THE LAW OF THE CASE.

As amended, Section 241 of the Labor Law, improved the existing industrial safety standards by extending the protection formerly provided to workers engaged in excavations in conjunction with building construction work to include excavation workers engaged in highway construction projects.

Prior to the 1962 amendment, Section 241 of the Labor Law read as follows:

"Sec. 241. Protection of employees on building construction or demolition work including excavation work in connection therewith."

The amendment was a substantial change from the prior section 241, as noted in the historical note at the bottom of page 307 of McKinney's Consolidated Laws of New York, Annotated, Book 30: *1 - *2 - *3

*1. The distinction was brought about by virtue of an excavation that gave way upstate where the subcontractor had violated the instructions of the New York State Labor Department Inspector and a week later the excavation caved in. The excavation was on a roadway without reference to any building or structure. Authority for the foregoing statement is the New York State Legislative Annual for 1962, pages 217, 218.

*2. Industrial safety S.I. 1223, Pr. 1233, Laverne Ch. 450 "LABOR LAWS, Sections 200, 240; Sections 241, 256, repeal; Section 241, new. The purpose of the bill is to improve existing safety standards in the Labor Law by providing protection to employees and the public in open areas, and by strengthening enforcement procedures."

*3. Section 241 of the Labor Law is repealed and under a new Section 241 safety standards will apply to excavation workers even though the excavation work is not in connection with a building or structure."

Section 241 of the Labor Law as amended, October 1, 1962, reads as follows:

"Section 241. CONSTRUCTION, EXCAVATION AND DEMOLITION WORK.

All areas, buildings or structures in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated

and conducted by the owners, contractors, and subcontractors as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The board may make rules to carry into effect the provisions of this section. Added L. 1962, c. 450, Section 3, eff. Oct. 1, 1962."

The protection intended was clearly expressed by Senator Laverne; S. I. 1223 Pr. 1233, Laverne Ch. 450.

The bill provided important and necessary improvements in existing safety standards; and, extended protection to highway excavation workers not specifically covered by the standards existings nior to the 1962 amendment of Section 241 of the Labor Law.

It was intended by the amendment that in addition to statutory liabilities, the respondent having the authority to prohibit statutory violations in the performance of the work involved in the overall plan of construction would be liable for any approval of unsafe, negligent, or unlawful practice of sub-contractors resulting in injuries to all workers or employees involved therein including the public generally.

The failure of the general contractor to act or exercise control of the excavation work under such inherently dangerous circumstances to safeguard workers from the dangerous practice of sub-contractors was to be considered to constitute a violation of the statute.

Rosenberg v. Schwartz, 260 N.Y. 162

Ramsey v. National Contracting Co., 49 App. Div. 11: 269 N.Y. 219

Haefeli v. Woodrich Engineering Co., 255 N.Y. 442

Hooey v. Airport Construction Co., Inc., 253 N.Y. 486-490

Griffen v. Manice, 166 N.Y. 188

Sherida.. v. Rosenthal, 206 App. Div. 279

Berg v. Parsons, 156 N.Y. 109

The law is well settled that a party having the power to take necessary precautions and failing to do so is liable for the consequences of a foreseeable accident.

Lotocka v. Elevator Supplies Co. et al 246 N.Y. 296

Besner v. Central Trust Co., 230 N.Y. 357

Mullen v. Rickwood Sprinkler Co., 57 N.Y. 567

DeHaen v. Rickwood Sprinkler Co., 248 N.Y. 350

Statutory provisions have been enacted to prevent the happening of an accident as in the instant case, therefore, the cavein of the trench is a basis for the presumption that it was due to negligence.

Mullen v. St. John, supra

Rosenberg v. Schwartz, supra

Hardie v. Boland Co., 205 N.Y. 336

Lotocka v. Elevator Supplies Company, et al, supra

Slater v. Barnes, 241 N.Y. 284

Petluck v. McGolrick Realty Co., Inc. 240 App. Div. 61

The duty of Slattery to provide a safe place to work was nondelegable under section 241 of the Labor Law as amended and in effect October 1, 1962.

The revised statute was inteded to safeguard all persons employed or lawfully frequenting areas of construction and excavation without distinction, including the public in open areas.

The decision by the Trial Court which was affirmed by the Court below was cearly erroneous in that it was based on the provisions of Section 241 of the Labor Law, prior to its amendment and the legal precedents relied upon by the Court were all prior to the amendment of Section 241 as aforesaid, and, therefor inapplicable.

The decision of the Court below seems to be in conflict with decisions in other jurisdictions as well. *Matanuska Electric Association v. Johnson,* 386 P. 2d 700 (1963); *Caporale v. Blakeslee & Sons,* 175 A. 2d 565 (1961); *Majestic Realty Ass. Inc., v. Toti Contracting Co.,* 153 A. 2d 327 (1959).

CONCLUSION

It is respectfully submitted that the questions raised by appellant merit consideration by this Honorable Court, as the rights and duties of all employers and employees engaged in construction require further and precise judicial clarification.

MEMORANDUM OF SAMUEL LEIBOWITZ, J.S.C.

SUPREME COURT – RICHMOND COUNTY

RAMON D'EUGENIO

-against-

SLATTERY CONSTRUCTION CO., INC.

Appearances:

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New York, N. Y. 10038

JOHN P. CONNORS, ESQ.
Attorney for Defendant
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Personal injury action.

The alleged accident occurred on September 27, 1963, at Clove Lakes Expressway, Staten Island, N. Y. Plaintiff was in the employ of Post Construction Co. ("Post"), a subcontractor of Slattery Construction Co., Inc. ("Slattery"), the general contractor. The work involved the installation of drain pipes under the roadbed. Plaintiff, while digging in a trench, was injured when the walls of the trench collapsed.

Plaintiff alleged that Post, his employer, negligently performed the excavation work below the surface of the roadbed, in violation of the Labor Law and/or the Rules of the

Boards of Standards and Appeals of both the State and City of New York. Post was not sued because employees are limited to workmen's compensation, for injuries received while at work, as against their employers. He, therefore, sued Slattery, the general contractor, claiming it to be responsible. He alleged that Slattery, as general contractor, negligently failed to provide safe place to work; to properly supervise the work of the subcontractor; and to require the subcontractor to perform in accordance with the Labor Law and the rules of the Board of Standards and Appeals and of the ordinances of the City of New York.

After hearing the proof of court finds that Slattery exercised no control over the work of Post (*Uppington v. City of New York*, 165 N.Y. 222)/ Post was an independent contractor and Slattery not obligated to protect Post's employees (*Zucchelli v. City Constr. Co.*, 4 N.Y. 2d 52, 56; *Wohlfron v. Brooklyn Edison Co.*, 238 App. Div. 463, 466, aff'd 263 N.Y. 547); the work was not dangerous or unsafe (*Chancy v. N.Y.C. Transit Auth.*, 12 A D 2d 61, aff'd 10 N Y 2d 871); the equipment, methods and work spaces were the sole responsibility of Post as an intimate detail of the job (*Cangiano v. Lo Bosco*, 23 A D 2d 860; *Curtis v. State*, 27 A D 2d 628) and that the injury arose through the negligence of Post as a detail of the work (*Wright v. Belt Assoc.*, 14 N.Y. 2d 129).

It is further found that Slattery did not become a co-tort feasor by agreeing to share with Post any saving effected in the cost of blasting and drilling, nor did Slattery confirm or ratify Post's performance of its duties.

Based on both the law as set forth herein and the facts as found, there is no liability for plaintiff's injuries imposed upon the defendant.

Accordingly the defendant's motion to dismiss for failure to prove a prima facie case is granted.

The foregoing shall constitute the decision of the court under section 4213(b) of the CPLR.

Submit judgment on notice.

s/ Samuel Leibowitz
J.S.C.

ORDER DENYING MOTION TO APPEAL

STATE OF NEW YORK
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventh day of July, A.D. 1971.

PRESENT, HON. STANLEY H. FULD,
Chief Judge, Presiding.

---

2 Mo. No. 574
Ramon D'Eugenio,

Appellant,

vs.

Slattery Construction Co., Inc.

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

A copy

s/Gearon Kimball
Deputy Clerk

Order on Appeal from Judgment

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on February 22, 1971

HON. SAMUEL RABIN, *Presiding Justice*
HON. HENRY J. LATHAM
HON. MARCUS G. CHRIST *Associate Justices*
HON. ARTHUR D. BRENNAN
HON. A. DAVID BENJAMIN

Ramon D'Eugenio,
Appellant,
v.
Slattery Construction Co., Inc.,
Respondent.

In the above entitled cause, the above named Ramon D'Eugenio, plaintiff, having appealed to this court from a judgment of the Supreme Court, Richmond County, dated August 19, 1969; and the said appeal having been argued by Jacob Rassner, Esq., of counsel for appellant and submitted by Patrick J. Hughes, Esq., of counsel for respondent; due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof; it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed, with costs.

Enter: HERMAN M. POGUL
Clerk of the Appellate Division

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IN THE

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OCTOBER TERM, 1971

No. 71-648

RAMON D'EUGENIO,
Petitioner,

against

SLATTERY CONSTRUCTION CO., INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT.

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Preliminary Statement

Although the printed petition docketed herein states that a writ of certiorari is sought to the Court of Appeals of the State of New York, by affidavit verified November 12, 1971 counsel for petitioner has requested this Court to consider the petition amended to seek certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department. Counsel for petitioner concedes that the petition, as docketed, is "incorrectly addressed to the Court of Appeals of the State of New York."

Jurisdiction

There is no jurisdiction whatever for entertainment of the petition. Not only is there no substantial federal question involved, there is *no* federal question involved. Moreover, Title 28, U.S.C. § 1257 subd. (3), under which jurisdiction is alleged in the petition to exist, precludes review of a decision of the Appellate Division, which is not the highest court of the State of New York.

Question Presented

The petition asserts that a proper interpretation of Section 241 of the Labor Law of New York is here involved. The petition states that the trial court's interpretation of Section 241 is repugnant to the Constitution, treaties and laws of the United States. However, nowhere in the petition is there any citation to the Constitution or to any treaty or federal law which the trial court's decision violated.

Statement

The statement presented in the petition as to the facts of this matter is entirely erroneous. There was no proof presented to the trial court with respect to the length of time in which the excavating operation had continued and no proof whatever that there was any period in which there had been any "disregard to the safety of the workmen." The true facts are as stated in the opinion of Mr. Justice Leibowitz, annexed to the petition as pages 8 to 10.

I

No Jurisdiction Exists for Entertainment of the Petition

A. No Federal Question Involved

While the petition asserts that the trial court's determination is repugnant to federal law, there is no mention whatever of the federal law to which the decision is allegedly repugnant. In fact, there has been no federal question involved in this case from its inception and the attempt, now, to assert the existence of such federal question is misguided. The petition clearly reveals that no federal question exists here.

Jurisdiction is alleged to exist under Title 28, U.S.C. § 1257 subd. (3) but the petition clearly fails to show the existence of jurisdiction under that statute. Rule 19 of the Rules of this Court similarly requires that a petition for a writ of certiorari show that there is involved a "federal question of substance." See also, Rules 23 subd. 1 (d), (f) and 40(c). Here, not only does the petition fail to show the existence of a substantial federal question, it completely fails to show the existence of *any* federal question.

The petition cannot be entertained. As was stated by this Court in *Herb* v. *Pitcairn,* 324 U.S. 117, 125-126 (1945):

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Murdock* v. *Memphis,* 20 Wall. 590, 636; *Berea College* v. *Kentucky,* 211 U.S. 45, 53; *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.,* 232 U.S. 157, 164; *Fox Film Corp.* v. *Muller,* 296 U.S. 207. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and

federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions."

B. No Determination of the Highest State Court Involved

Title 28, U.S.C. § 1257 provides for review by this Court by writ of certiorari only of "final judgments or decrees rendered by the highest court of the State in which a decision could be had." Here, unquestionably, the determination for which review is sought is not that of the highest court of the State of New York.

The printed petition states that a writ of certiorari is sought to the Court of Appeals of the State of New York. Actually, as the printed petition discloses, there has been no determination in this matter by the Court of Appeals of the State of New York. That court merely denied the motion by this petitioner for leave to appeal to that court.

Petitioner recognizes this deficiency and has, by typewritten amendment, sought to have the printed petition corrected so as to direct the writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, an intermediate appellate court.

Under the circumstances, it is evident that there is no ground whatever here for the issuance of a writ by this Court.

II

No Merit Exists to the Petition.

The opinion of the trial court, printed in the petition, sets out the pertinent facts and makes the conclusion that, under the law of the State of New York, no liability existed

on the part of this respondent to this petitioner on the facts of this case. The determination was entirely correct.

Under New York law it is clear that Section 241 of the Labor Law does not impose absolute liability on a general contractor, such as this respondent, for a violation of the Section by a sub-contractor, as allegedly occurred in this case. *Curtis* v. *State of New York,* 23 N.Y. 2d 976 (1969); *Corbett* v. *Brown,* 32 App. Div. 2d 27 (3d Dept. 1969); *Lipka* v. *United States,* 369 F.2d 288 (CA 2d 1966) cert. den. 387 U.S. 935 (1966).

The proof in this case clearly showed that there was no violation of the New York Labor Law by the sub-contractor —even though the trial court found the sub-contractor negligent—and, further, that the sub-contractor's work was neither dangerous nor unsafe. Under the New York decisions construing Section 241, this respondent was not responsible for supervising the details of the sub-contractor's work. *Curtis* v. *State of New York, supra; Lipka* v. *United States, supra* (citing the *Curtis* case); *Zuchelli* v. *City Construction Co.,* 4 N.Y. 2d 52 (1958); *Wright* v. *Belt Associates,* 14 N.Y. 2d 129 (1964); *Cangiano* v. *LoBosco,* 23 App. Div. 2d 860 (2d Dept. 1965) aff'd 18 N.Y. 2d 922 (1966). Under New York law, respondent had no duty to inspect the sub-contractor's method of doing the work (*Olsommer* v. *George W. Walker & Sons, Inc.,* 4 App. Div. 2d 424 [4th Dept. 1957] aff'd 4 N.Y. 2d 793 [1958]) since respondent had no control over the subcontractor's work. *Gambella* v. *John A. Johnson & Sons,* 285 App. Div. 580 (2d Dept. 1955).

The Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, has unanimously affirmed, without opinion, the determination of the trial court. The highest court of the State of New York, the Court of Appeals, has refused to grant leave to appeal to that court to this petitioner. Obviously, the

judicial tribunals of the State of New York have been in unanimous agreement that there is no basis whatever for this petitioner's suit against this respondent.

Even if this Court could entertain the petition, the petition should be denied.

Conclusion

Since no jurisdiction to entertain this petition has been shown, the petition should be dismissed. Even if this Court could entertain the petition, the petition should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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Respondent.

PETITIONER'S REPLY BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No. 71-648

RAMON D'EUGENIO,
Petitioner,

-against-

SLATTERY CONSTRUCTION CO. INC.,
Respondent.

PETITIONER'S REPLY BRIEF

Respondent endeavors to give sanctification to State Court judgments, denying to this Court the right to review.

As authority for such radical departure from well settled and controlling law, respondent has failed to note the very prerequisite which has been the basis for "...the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." (*Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945)).

Petitioner is not seeking "to revise opinions" but is asking this Court "to correct wrong judgments".

The right to ask for the relief prayed for by petitioner to correct wrong judgments is not subject to question and has been conceded on pages 3 and 4 of respondent's brief.

Petitioner has been denied "due process of law" as provided by the fifth and fourteenth amendments of the United States Constitution.

The brief for respondent in opposition to the petition herein argues that the provisions of § 241 of the New York Labor Law are not unconstitutional.

This is not the question before this Honorable Court.

Petitioner does not claim that the language of the statute is repugnant to the Constitution.

Petitioner has claimed from the very inception of the trial before the Hon. Samuel Leibowitz, Supreme Court Trial Judge, that the statute provides remedial rights, including a cause of action against the general contractor for the consequences of a cave in of the walls of a deep and dangerous ditch which buried and injured the petitioner.

Petitioner demonstrated that such remedial rights are provided by the State statute and have been generally granted to persons injured under identical circumstances to that of petitioner, and that the denial to the petitioner of his day in Court on the merits constituted an erroneous interpretation of the provisions of § 241 of the New York Labor Law, as amended October 1, 1962, which erroneous interpretation is just as repugnant as violation of due process of law, as if the statute itself was unconstitutional.

JURISDICTION

This Court is asked to correct a wrong judgment which has denied to petitioner due process of law as guaranteed by our Constitution.

QUESTION PRESENTED

The question presented is whether a correct statute has been incorrectly interpreted so as to result in depriving petitioner of his constitutional rights to a trial on the merits.

PAGE 2 OF RESPONDENT'S BRIEF UNDER THE HEADING "STATEMENT" CLAIMS LACK OF PROOF AS TO LENGTH OF TIME THE "EXCAVATING OPERATION HAD CONTINUED".

The trial record pages (A23, A24) shows at least ten years duration, as testified to by Eugene C. McCaffrey, New York State Department of Labor Inspector as follows:

"Q Has he done the job the same way that he did this job in other cases?

A You mean as far as the sheathing, shoring?

A Yes.

Q And this was just in accordance with the way he's been doing things?

A That is right.

Q Over how many years?

A Well, I don't know exactly how many years he's in business, but I do know –

Q As far as you know.

A As much as I can remember, it must be at least ten years."

The length of time would be immaterial as the operation was inherently dangerous. Mr. McCaffrey testified at page A32:

"Q Now, assuming that the trench is dug twice the length of the waler, will you consider that good and safe practice or dangerous practice?

A I would say it's inherently dangerous."

The argument that this Court does not have jurisdiction is baseless, as the very authorities cited by respondent at pages 3 and 4 of its brief demonstrate jurisdiction.

In addition, the question of Constitutional rights are always matters within the power of this Court to review. *Tot v. United States,* 319 U.S. 463, 63 S.Ct. 1241; *United States v. Thoresen,* 281 F. Supp. 598 (1967).

The manner of interpreting a statute is severable from the wording of the statute, and although the statute as read may be constitutional, the manner of its application may be repugnant, as in the instant case, to the Constitution of the United States.

In the case of *United States v. Thoresen, supra,* the Court stated at page 608:

"This Court adopts the below quoted portion of an opinion in Velazquez v. Hunter, 159 F. 2d 606 (10th Cir. 1947) which deals with the same contention:...."

Review is sought of a judgment by the Appellate Division which is the highest Court which was available to petitioner on a State Court level, leave to appeal further was denied.

No provision for further appeal exists although the question of violation of the U.S. Constitution was specifically raised in the Courts below.

On page 5 of respondent's brief, an attempt is made to justify the manner of the interpretation of § 241 of the New York Labor Law. Whether or not other State Courts have ruled in a manner comparable to that of the Courts below in the instant case is not dispositive of the question before this Honorable Court.

The simple fact is that claimants generally have been granted the right to maintain a cause of action under identical circumstances on the basis of Section 241 of the New York Labor Law as amended October 1, 1962, and petitioner was denied the same right.

CONCLUSION

It is respectfully submitted that the petition is meritorious.

Respectfully submitted,

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